MOTION FILED
AUG 11 1992

No. 92-110

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF EL PASO,

Petitioner,

v.

PHYLLIS WOODALL, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED BY THE CITY OF EL PASO

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, the National Institute of Municipal Law Officers (NIMLO) requests leave of this Court to file a brief *amicus curiae* in support of Petitioner City of El Paso because consent of the Respondents has been refused. Consent of Petitioner City of El Paso has been obtained.

The members of NIMLO, including Petitioner City of El Paso, Texas, are state political subdivisions. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, or any one of some twenty other titles. Arguably, consent may not be required pursuant to Rule 37.5 because the brief is signed by municipal attorneys both on behalf of NIMLO and their own municipalities.

For all the foregoing reasons, NIMLO respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. CERTIORARI SHOULD BE GRANTED TO REVERSE THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT LAND WHICH IS PHYSICALLY, LEGALLY, OR ECONOMICALLY UNSUITABLE FOR ADULT BUSINESSES IS CONSTITUTIONALLY "UNAVAILABLE." 6

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) 6, 13, 14

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29, *reh'g. denied*, 475 U.S. 1132, 106 S. Ct. 1163, 90 L. Ed.2d 205.... *passim*

D.G. Restaurant Corporation v. City of Myrtle Beach, 953 F.2d 140 (4th Cir. 1991).....6, 16

International Food and Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986) 6, 15, 16

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)..... 6

Woodall v. City of El Paso, 950 F.2d 255 (5th Cir. 1992)..... *passim*

Woodall v. City of El Paso, 959 F.2d 1305 (5th Cir. 1992).....2, 3, 17

Young v. American Mini Theatres, Inc., 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976)..... *passim*

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BRIEF *AMICUS CURIAE* OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED BY THE CITY OF EL PASO

INTEREST OF THE *AMICUS CURIAE*

This brief *amicus curiae* is filed pursuant to Rule 37 of the Rules of this Court, on behalf of the more than 1,500 local governments that are members of the National Institute of Municipal Law Officers (NIMLO).

The members of NIMLO, including Petitioner City of El Paso, Texas are state political subdivisions. NIMLO is

operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, or any one of some twenty other titles. The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and on behalf of each of their own municipalities.

The attorneys who operate NIMLO are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of citizens through the regulation of matters which are of genuine local and municipal concern. These attorneys also represent their governments in litigation resulting from the enforcement of such regulations.

NIMLO finds this case to be of great significance. NIMLO's membership, which consists primarily of local governments, must be able to make constitutionally sound zoning and planning decisions based on clear precedent. This Court's decisions in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) provided guidance to municipalities on ways in which municipalities could enact zoning restrictions without violating citizens' rights of free expression or other constitutional protections. This case, however, reveals that courts need more specific guidance in applying these standards to "adult" business zoning ordinances.

In *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992) the Fifth Circuit held that the district court erred

because it failed to provide the jury with sufficient guidance to determine what land could be considered "reasonably available" for First Amendment purposes. NIMLO believes the Fifth Circuit ruling is a misinterpretation of the *Renton* holding and an application of the wrong legal standard.

In *Young v. American Mini Theatres, supra,* this Court held that a City of Detroit zoning ordinance, which set distance limitations for the location of adult theatres, did not violate the First or Fourteenth Amendments. *Young* also established that First Amendment inquiries do not require an analysis of economic impact. Lower courts have consistently upheld regulations that may have a detrimental economic effect on any type of commercial activity.

In *Renton,* this Court favorably cited *Young* and found that zoning regulations which circumscribe the location of adult theatres, but do not ban such theatres, are valid if the municipal legislative body enacting them reasonably believes the regulations will address problems associated with adult businesses. The *Renton* Court held that this reasonable belief need not be based upon studies or research conducted by or about the municipality itself, but can be drawn by inference from studies conducted in other municipalities.

The *Renton* decision discussed whether or not certain adult business zoning regulations allowed for "reasonable alternative avenues of communication." The Fifth Circuit holding in *Woodall v. City of El Paso,* that land which was not currently for sale or lease, undeveloped, or otherwise not "commercially viable," was not truly

available for constitutional purposes, is contrary to the holding in *Renton*.

The Fifth Circuit erred by making a distinction between land that is available in fact and land that is constitutionally available when the *Renton* standard is applied. The Fifth Circuit erroneously mandated that the jury consider physical and legal characteristics of available land, considerations explicitly rejected by this Court in *Renton*.

NIMLO is greatly concerned that this decision leaves an important area of constitutional jurisprudence in a state of confusion. The Fifth Circuit's holding in this case is also in direct conflict with several decisions of other circuits. The *Renton* and *Young* decisions are the standards set by this Court for adult business zoning regulations. If this decision is allowed to stand then NIMLO fears that many of its member municipalities will be burdened by challenges to their ordinances that misconstrue the teachings of *Renton* and *Young*.

This Court should emphatically state that the *Renton* decision rejected the consideration of legal, physical and economic aspects of available land in adult business zoning cases. Otherwise, municipalities will be forced to give site by site consideration to the land areas that are available, perhaps at bargain prices, to adult businesses.

Zoning as a means to shape the nature of a community and preserve and enhance quality of life in a community is one of the crucial powers of a municipality. *Young* and *Renton* are important tools that allow municipalities to accomplish these ends while preserving freedom of expression.

NIMLO, therefore, urges this Court to grant the Petition for a Writ of Certiorari filed by Petitioner City of El Paso, and ultimately to reverse the ruling of the Fifth Circuit Court of Appeals.

STATEMENT OF THE CASE

The statement of the case as set forth in Petitioner's Petition for Writ of Certiorari is adopted by amicus for purposes of this brief *amicus curiae*.

SUMMARY OF ARGUMENT

The Petitioner seeks review of the United States Court of Appeals for the Fifth Circuit's decision reversing and remanding this case for a new trial on the crucial issue of whether the instructions given to the jury were sufficient to guide the jury's determination of what land they could consider as "available" for First Amendment purposes. The parties entered into several stipulations and the sole issue present in this case is whether the zoning ordinance allows Respondents reasonable alternative avenues of communication.

NIMLO supports the Petition for a Writ of Certiorari because the decision of this Court in *City of Renton v. Playtime Theatres, Inc., supra*, provides the standard for determining whether "reasonable avenues of communication" exist. The United States Court of Appeals for the Fifth Circuit misapplies this standard. NIMLO also urges this Court to grant a writ of certiorari and reverse the

decision of the United States Court of Appeals for the Fifth Circuit because it is in conflict with several United States Courts of Appeal decisions, including *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991); *International Food and Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986) and *D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO REVERSE THE FIFTH CIRCUIT COURT OF APPEALS' DECISION THAT LAND WHICH IS PHYSICALLY, LEGALLY, OR ECONOMICALLY UNSUITABLE FOR ADULT BUSINESSES IS CONSTITUTIONALLY "UNAVAILABLE."

A. The Supreme Court's Treatment of Zoning Laws Targeting the Secondary Effects of Adult Businesses.

In *Young v. American Mini Theatres, Inc., supra*, Justice Powell stated that "zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life,' " 427 U.S. at 80 (Powell, J., concurring) (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)). In *Young*, the Court held that the City of Detroit's zoning ordinance, which prohibited locating an adult theatre within 1,000 feet of any two other "regulated uses" or within 500 feet of any residential zone, did

not violate the First and Fourteenth Amendments. *Id.* at 72-73 (plurality opinion of Stevens, J., joined by Burger, C.J., and White and Rehnquist, JJ.); *id.* at 84 (Powell. J., concurring). The Court found that the interest advanced by the ordinance was neighborhood stabilization, and that such an interest is important and substantial.

The ordinance reviewed in *Young* was held not to violate the First and Fourteenth Amendments despite the economic loss which it created for some engaged in the "adult entertainment" business. This was so because "[t]he inquiry for First Amendment purposes *is not concerned* with economic impact." *Id.* at 78 (Powell, J., concurring) (emphasis added). The plight of businesses forced to relocate under the ordinance was not constitutionally significant because "[i]n this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation," and because "[t]he cases are legion that sustained zoning against claims of serious economic damage." *Id.* at 78 (Powell, J., concurring).

Young's principles were reaffirmed by the Court in *City of Renton v. Playtime Theatres, Inc., supra.* The Renton ordinance, like the one in *Young*, did not ban adult theatres altogether, but merely provided that such theatres could not locate within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park or school. Since the ordinance circumscribed the location of adult theatres as a means of combating the harmful secondary effects of such theatres, rather than curtailing the content of speech or speech-related activity occurring therein, the ordinance was analyzed as a form of time,

place and manner regulation. 475 U.S. at 46. Such regulations are constitutional so long as they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. *Id.* at 47.

Renton advanced First Amendment jurisprudence beyond the point it had been taken by *Young* in two respects. First, the Court upheld the Renton ordinance even though it was enacted without the benefit of studies specifically related to the particular problems or needs of Renton. In the absence of such studies the Ninth Circuit invalidated the ordinance, finding that the city's justification for it was conclusory and speculative. The Supreme Court reversed, holding that the Ninth Circuit imposed an unreasonably rigid burden of proof on the city. The Supreme Court stated: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses." *Id.* at 51.

The second aspect of *Renton* which expanded upon *Young* was its discussion of the requirement that time, place, and manner regulations "allow[] for reasonable alternative avenues of communication." *Id.* at 53. The ordinance in *Renton* left some 520 acres, or more than five percent of the entire land area of Renton, open to use as adult theatre sites. Respondents argued that some of that acreage was already occupied by existing businesses, that some of it consisted of undeveloped land, practically none of which was available for sale or lease, and that in general there were no "commercially viable" adult theatre sites within the 520 acres left open by the Renton

ordinance. The Ninth Circuit accepted respondents' arguments, concluding that the 520 acres was not truly available land, and therefore held that the Renton ordinance would result in a substantial restriction on speech.

The Supreme Court disagreed with both the reasoning and the conclusion of the Ninth Circuit.

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. . . . [W]e have never suggested that the First Amendment compels the government to assure that adult theatres, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See [*Young v. American Mini Theatres, Inc.*, 427 U.S.] at 78 (Powell, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact"). In our view, the First Amendment requires only that Renton refrain from denying respondents a reasonable opportunity to open and operate an adult theatre within the city, and the ordinance before us easily meets this requirement.

475 U.S. at 54.

B. The Fifth Circuit Departed from Renton in Woodall v. City of El Paso.

The fundamental flaw with the decision of the Fifth Circuit in the instant case is its failure to recognize that "[t]he inquiry from First Amendment purposes is not concerned with economic impact." *Young*, 427 U.S. at 78 (Powell, J., concurring), *Renton*, 475 U.S. at 54. The Fifth

Circuit's decision creates a distinction – based on economic impact – between land which is "available" in fact (i.e., permitted to be used for adult businesses under a zoning ordinance) and that which is "constitutionally available" (i.e., land which may be considered a reasonable alternative avenue of communication for constitutional purposes). *Woodall v. City of El Paso*, 950 F.2d 255, 261 (5th Cir. 1992). Such a distinction is inconsistent with the rationale and holding of *Young* and *Renton*.

In *Woodall* the parties presented evidence in support of their respective positions on the number of adult business sites and amount of acreage that comply with El Paso's zoning ordinances. The city's planning coordinator testified that the ordinances permit 78 adult business sites on 1,433, or .91%, of El Paso's 158,000 acres. Respondents submitted expert testimony to support their argument that it is *impossible* for them to relocate on most of these 1,433 acres.

Respondents submitted testimony concerning physical, legal and economic characteristics of the acreage which El Paso asserted was available for location of adult businesses. With regard to physical characteristics, respondents' evidence showed that some of that acreage:

> has nothing on it; has topographical or physical impediments to buildings; lacks street access; entails an extraordinarily high cost of building; lacks available utilities; is landlocked; is an area of concrete retaining walls; is a United States Customs holding area; is a cotton field and has sharecropper houses; contains large industrial warehouses; consists of sand dunes, cliffs, gulleys and ponding areas, including the Jesuit

> Drain basin, Peter Cooper ponding area and Pullman Drain; or, is desert land. [950 F.2d at 262]

With regard to legal characteristics, respondents' evidence showed that some of the acreage El Paso contended was "available" under the ordinances:

> could not receive a city building permit because it is a ponding area; is airport property where the city would never approve a lease to an adult business; is the portion of a shopping mall area required by law to be dedicated to parking; is subject to restrictive covenants that prohibit its use for an adult business; or, is subjected to deed restrictions or special contracts which proscribe adult businesses or retail use. [950 F.2d at 262]

The jury was requested to answer special interrogatories concerning: a) The number of adults businesses operating in El Paso when the ordinances went into effect; b) the number of adult business sites permitted under the ordinances; c) the amount of acreage upon which adult business may operate under the ordinances; and d) whether the ordinances deny respondents "a reasonable opportunity to open and operate their adult entertainment businesses." 950 F.2d at 257. To aid its deliberations the jury was instructed that:

> [a]creage and sites are not "unavailable" solely because they are already occupied by existing businesses, or because "practically none" of the undeveloped land is currently for sale or lease, or because in general there are no "commercially viable" adult entertainment sites within the area which complies with the ordinance. [950 F.2d at 261].

The jury found that 39 adult businesses operated in El Paso on March 22, 1988; the ordinances allow for 59 adult business sites on 1,165 acres; and the ordinances do not deny respondents "a reasonable opportunity to open and operate their adult entertainment business." 950 F.2d at 257.

The Fifth Circuit found the jury instructions insufficient.

It held:

> As to those aspects of physical or legal unavailability that were put in issue by the evidence and required some fact determination, the court should have told the jury that *land cannot be found to be reasonably available if its physical or legal characteristics made it impossible for any adult business to locate there.* [950 F.2d at 262-263 (emphasis added)]

A remand to the district court based on the above-quoted direction from the Fifth Circuit will leave the district court in a quandary. The Fifth Circuit announces a new test which is not present in either *Young* or *Renton*. Under the Fifth Circuit's formulation, "land cannot be found to be reasonably available if its physical or legal characteristics [make] it impossible for any adult business to locate there." *Id.* at 263. The Fifth Circuit, however, has not defined *which* physical or legal characteristics actually make relocation impossible.

As a basis for determining whether the ordinance "allows for reasonable alternative avenues of communication," *Renton*, 475 U.S. at 53, the standard announced by the Fifth Circuit will provide the jury with no more

guidance than the instructions that the jury actually received. Indeed, under the directive provided by the Fifth Circuit, the jury will be called upon to decide an issue which should be decided as a matter of law.

The Fifth Circuit has directed the district court to instruct the jury to apply a legal standard which was repudiated in *Young* and *Renton*. The *Renton* Court held that as long as there is a reasonable opportunity for adult businesses to open and operate within the city it is of no constitutional moment that some land upon which they must relocate is already occupied by existing businesses, is undeveloped, or is not commercially viable. The Fifth Circuit in *Woodall*, however, ignored that holding. Under the formulation of the Fifth Circuit, land upon which it is "impossible" for an adult business to relocate includes, among others, land which is undeveloped, lacks street access, is desert land, or entails an extraordinarily high cost of building. At the direction of the Fifth Circuit, the jury must be instructed *not* to consider such land as being available for purposes of determining whether El Paso's ordinances allow for reasonable alternative avenues of communication. The Fifth Circuit's direction, your amicus suggests, is erroneous.

C. The Decision in Woodall Conflicts with Decisions from other Courts of Appeal.

The decision in *Woodall* is in conflict with that in *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991). In *Alexander*, the Eighth Circuit reversed the judgment of the district court that declared unconstitutional Minneapolis'

ordinances requiring adult-only businesses to operate within a specifically zoned district of the city. 928 F.2d at 280. The plaintiff in *Alexander* claimed in the district court that the ordinances would effectively put his theatres out of business because no reasonable opportunity existed for their relocation. Although the ordinances left 6.6% of the total acreage of the city's commercial land available for adult businesses, the district court declined to hold as a matter of law that the ordinances were sufficient to provide reasonable access to protected speech. Instead, the district court focused on plaintiff's testimony concerning his unsuccessful attempts to relocate his theatres, and concluded that the ordinances worked to suppress and greatly restrict access to protected speech. 928 F.2d at 283. The Eighth Circuit reversed because the district court applied an incorrect legal standard in striking down the ordinance. The Eighth Circuit stated:

> "The inquiry for First Amendment purposes is not concerned with economic impact." *American Mini Theatres*, 427 U.S. at 78 (Powell, J., concurring). The district court, however, did consider testimony by Alexander that the one potential relocation site he found was cost-prohibitive. Additional testimony from Alexander that no one would sell or lease property on which he could relocate his business was also *irrelevant* to the First Amendment inquiry. [928 F.2d at 283 (emphasis added)]

There are two significant respects in which the decisions in *Woodall* and *Alexander* conflict. First, though the *Woodall* court considered an "extraordinarily high cost of building" a physical characteristic of land which is constitutionally significant, 950 F.2d at 262, the *Alexander*

court recognizes such evidence to be irrelevant to the First Amendment inquiry. Secondly, while *Woodall* approved of the district court's use of special interrogatories requiring the jury to determine whether adult businesses were denied a reasonable opportunity to open and operate, *Alexander* recognizes that such an inquiry is to be decided as a matter of law by the court.

In *International Food and Beverage Systems v. City of Fort Lauderdale,* 794 F.2d 1520 (11th Cir. 1986) the Eleventh Circuit properly applied the *Renton* standard. Thus, this case is also in conflict with the holding in *Woodall. International Food and Beverage Systems* involved a challenge to a municipal ordinance that prohibited the operation of "nude" bars within 750 feet of any land zoned or used for residential purposes or any church, school, public park, playground or another nude bar. *Id.* at 1523. The plaintiff, an owner and operator of nude bar type businesses in several states, filed suit for injunction or declaratory judgment. *Id.* at 1524.

At trial, the city planner offered evidence of available sites, but the district court held the 25 sites included many that were "not really available" and found the ordinances unconstitutional because they were "not the least restrictive means of controlling first amendment activities." *Id.* at 1525.

The Eleventh Circuit vacated and remanded the decision for reconsideration in light of *Renton. Id.* at 1528. The district court had "finessed" the law by finding that the asserted reasons for the ordinances were pretextual, with a true purpose to suppress expression. *Id.* at 1525. The Eleventh Circuit rejected the district court's conclusion

that there was an effort to suppress expression. *Id.* at 1524. While the Eleventh Circuit acknowledged that the planning director for the city may have erred in the precise number of sites available, it found itself "at a loss how anyone could determine that as many as 22 sites for such bars were not enough, without reference to community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plan works toward." *Id.* at 1525. The Eleventh Circuit added that *Renton* did not hold that the city may not "limit alternative avenues of communication," but only that "it may not limit them *unreasonably.*" *Id.* (emphasis added).

Another example of a conflict among the circuits is *D.G. Restaurant Corporation v. City of Myrtle Beach,* 953 F.2d 140 (4th Cir. 1991), where the Fourth Circuit upheld the constitutionality of an ordinance that prohibited businesses from offering nudity within 500 feet of residential areas, churches, schools, parks and other regulated adult businesses. *Id.* at 141. The Fourth Circuit held that the ordinance allowed for reasonable alternatives to the asserted regulation of speech and rejected the plaintiff's contention that the zoning ordinance effectively barred topless dancing in that area.

The business operator's argument that the Myrtle Beach ordinance limited adult business to the "C-9" zone which was comprised of "a few poorly lit sites in industrial areas, far from the tourist oriented businesses" did not persuade the Fourth Circuit that the restriction would "impede the restaurant's ability to convey its message to those listeners who desire to be enlightened by it." *Id.* at 147. The decision to restrict adult businesses to a specific

area did not oblige the city, in turn, to provide commercially desirable land. *Id.* This decision conflicts with *Woodall* because the Fourth Circuit properly refused to consider physical and economic characteristics of the land in the "C-9" zone as a basis to affirm the district court's judgment.

D. There is a Need for Supreme Court Guidance.

The issue presented in the Petition herein is important to the public. The issue is not merely academic nor one which will recur infrequently. The lower federal and state courts need guidance from the Supreme Court concerning the factors which are relevant for determining whether ordinances such as that involved in the instant case leave constitutionally sufficient alternative avenues of communication.

In *Woodall*, the Fifth Circuit held that physical and legal characteristics of land must be considered on the issue of availability of alternative avenues of communication. The court recognized that the "line between legal and physical impracticalities and economic impracticalities is thin," 950 F.2d at 261 n. 5, and that "[t]he standard for determining when land is economically unsuitable as an alternative avenue of communication remains *obscure*,"[1] *id.* (emphasis added).

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[1] The court's observation concerning the obscurity of the issue before it is contained in the portion of the court's opinion which was withdrawn upon rehearing. See *Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir. 1992). However, the court's recognition that Supreme Court guidance is lacking concerning the constitutional significance, if any, of legal and physical impracticalities is no doubt true.

The issue remains obscure, and is likely to lead to confusion and inconsistent results in other cases, because of two sweeping statements of the Supreme Court which are arguably inconsistent. In both *Young* and *Renton* the Supreme Court stated that "[t]he inquiry for First Amendment purposes is not concerned with economic impact." *Young*, 425 U.S. at 78 (Powell, J., concurring), *Renton*, 475 U.S. at 54. At the same time, in *Renton* the Court observed that the First Amendment requires cities to "refrain from *effectively* denying [adult businesses] a reasonable opportunity to open and operate," *Renton*, 475 U.S. at 54 (emphasis added). The word "effectively" can be misconstrued, as your amicus suggests it was by the Fifth Circuit in *Woodall*, as creating a qualification to this Court's statements in *Young* and *Renton* that economic impact is not constitutionally significant. NIMLO requests that this Court remove any doubts about how the *Renton* and *Young* decisions should be read when applied to factual situations such as those found in *Woodall*.

CONCLUSION

For all of the foregoing reasons it is urged that the Court grant a writ of certiorari and reverse the decision of the United States Court of Appeals for the Fifth Circuit.

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August, 1992